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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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No. 629

FRANCESCO MASTRAPASQUA,
Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

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The petitioner, Francesco Mastrapasqua, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming an order of the District Court for the Southern District of New York discharging the writ of *habeas corpus* herein.

Opinions Below

On June 13, 1949, the District Court dismissed the writ of *habeas corpus* herein after filing a memorandum opinion dated June 7, 1949. On March 2, 1950, the Circuit Court of Appeals, Judges Augustus Hand, Chase and Frank presiding, reversed and remanded the cause in accordance with its opinion dated March 2, 1950. Judge Chase dissented in a separate opinion. These opinions are reported at 180 F. 2(d) 999. Thereafter the District Court again dismissed the writ of habeas corpus on November 4, 1950 and on appeal, with Judges Augustus Hand, Chase and Clark presiding, the Circuit Court affirmed the dismissal on February 15, 1951.

Jurisdiction

The judgment of the Court of Appeals was entered on February 15, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether an alien may be ordered deported and denied discretionary relief from deportation pursuant to an unpublished ruling of the Attorney General, issued prior to the law under which relief is sought (Public Law 863, 80th Congress, 62 Stat. 1206) and rendered in violation of the Attorney General's own regulations (8 C. F. R. 90.12) which require him to state his conclusions and reason for his decision whenever he reverses the Board of Immigration Appeals.

2. Whether a deportation order under the aforesaid circumstance violates the due process clause of the Fifth Amendment.

3. Whether the refusal to grant discretionary relief in the instant case under Public Law 863, 80th Congress (62

Stat. 1206) upon the basis of an opinion of the Attorney General which was issued prior to such statute and which gave no reason for his action constitutes a refusal to exercise discretion or an abuse of discretion reviewable by judicial action.

Statutes and Regulations

Title 8, U. S. Code, Section 155c as amended by 62 Stat. 1206 provides:

> "Sec. 155(c) *Deportation of undesirable aliens generally.* In the case of an alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

5 U.S.C.1009e provides:

> "(e) Scope of review. — So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law; . . ."

8 C.F.R. 90.12 provided in part in 1946 as follows:

"In any case in which the Attorney General shall reverse the decision of the Board, . . . the Attorney General will state in writing his conclusions and the reasons for his decision."

8 C.F.R. 142.1 and 142.2 read as follows:

"Sec. 142.1 *Who may apply.* An alien who is a member of any of the following classes and who intends to apply to a consular officer of the United States in Canada for an immigration visa for entry into the United States for permanent residence may, subject to the provisions of this part, apply for the privilege of a preexamination by officers of the Immigration and Naturalization Service for the purpose of determining in advance his admissibility into the United States for permanent residence when in possession of an unexpired immigration visa:

(a) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has been within the United States for a period of one year or more and who has a spouse, parent, or minor child, who is in the United States and is a citizen thereof or is a lawfully permanent resident alien;

(b) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has resided in the United States for a period of five years or more; or

(c) An alien—other than a citizen of Canada—whose case is found to be an exceptionally meritorious case.

"Sec. 142.2 *Aliens eligible.* Preexamination shall not be authorized unless it appears to the officer granting such authorization that the alien is:

(a) Admissible to Canada;

(b) Of good moral character;

(c) Registered and/or fingerprinted as required by the Alien Registration Act, 1940; and

(d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence."

Statement

The facts herein are fully set forth in the opinion of the Court of Appeals. 180 F. (2d) 999, 1004, 1005.

Petitioner is a citizen of Italy who has resided in the United States since his arrival at Boston, Massachusetts on June 7, 1940. The petitioner came to the United States as a seaman and following the entry of Italy into World War II respondent's vessel remained in port and he remained on board. On March 30, 1941, pursuant to a program to prevent possible destruction of Italian vessels the respondent was removed from his vessel by the Coast Guard and even though we had not yet entered the War, he was interned pursuant to a policy of the Attorney General. On March 31, 1941 a warrant of arrest in deportation was issued on the ground that after entry as a seaman, petitioner remained longer than permitted. During the War the respondent was interned at Fort Missoula, Montana along with other recently arrived Italian seamen and he was subsequently released in March of 1944. On December 12, 1947 the Board of Immigration Appeals directed that the petitioner leave the United States within 60 days. He failed to depart and thereafter his deportation was directed on the ground that he remained in the United States longer than permitted under the Immigration Act of 1924 (8 U.S.C.214). (It is questionable whether petitioner is deportable on this charge. He was not admitted to the United States under the Act of 1924, but rather was brought in involuntarily by the Coast Guard.)

In a decision dated October 1, 1948 and set forth in the Court of Appeals opinion, 180 Fed. 2d at 1004, the Board of Immigration Appeals refused to grant discretionary relief known as preexamination (8 C.F.R.142) which procedure would permit the petitioner to become a permanent resident of the United States, on the ground that the Attorney General had refused to legalize the status of an alien by the name of Lagomarsino, "a case involving a similar factual background in that Lagomarsino was an Italian seaman whose presence in the United States was the result of conditions arising out of World War II. The Attorney General refused to legalize Lagomarsino's residence through preexamination proceedings even though he was married to an American citizen." (180 F. 2(d) 1004.) The *Lagomarsino* case is set forth in the record and annexed to the Court of Appeals opinion at 180 F. 2(d) 1006. As the record will show in the *Lagomarsino* case the Attorney General reversed the Board of Immigration Appeals without assigning any reason for his decision, contrary to 8 C.F.R. 90.12 (180 F. 2(d) 1003, 1010).

On July 1, 1948, Congress enacted Public Law 863 (62 Stat. 1206) amending Section 19c of the Immigration Act of February 5, 1917 (8 U.S.C.155c) to authorize the suspension of deportation in the cases of aliens without American family ties who had seven years residence in the United States. (See House Report 647 and Senate Reports 1201 and 1204, 80th Congress). Thereafter the petitioner applied for discretionary relief under this statute. It will be noted that the statute was enacted subsequent to the date of the Attorney General's decision in the *Lagomarsino* case which was rendered on February 8, 1946. Nevertheless, on December 3, 1948, the Board of Immigration Appeals denied relief to the petitioner under Public Law 863 on the basis of the *Lagomarsino* case with the following statement (180 F. 2(d) 1006):

"The case is one squarely within the terms of the decision of the Attorney General in the *Lagomarsino* case (supra) and accordingly he cannot be granted the privilege of applying for suspension of deportation. The motion must therefore be denied."

Thereafter, on May 4, 1949 petitioner filed a writ of habeas corpus. On appeal to the Circuit Court of Appeals, the court speaking through Judge Frank said:

"However since in Lagomarsino he overruled the Board and thus agreed with the Commissioner, it seems clear that the Attorney General was acting in accordance with the 'policy' of refusing to consider whether or not to give discretionary relief of preexamination to any persons coming within a fixed category, i.e., those whose presence in the United States is due solely to the war. It is also clear that the Board felt constrained by the Lagomarsino decision to apply the 'policy' based on this classification to Mastropasqua's requests for, first, preexamination, and later suspension of deportation. No justification of this classification is in the record of either the present case or in Matter of Lagomarsino. Nor can we discern any. There seems no more rationality in this classification than there would be in arbitrarily refusing to consider discretionary relief for all lefthanded men or for all whose names begin with the first thirteen letters of the alphabet. Consequently we conclude that the classification is capricious."

The Circuit Court remanded the case with directions to the Immigration Service to exercise discretion one way or another. On September 14, 1950, the Board of Immigration Appeals rendered a decision which is annexed hereto as Exhibit A in which it again denied relief on the basis of the *Lagomarsino* case. It stated:[1]

"We hold it would be arbitrary and capricious on our part to grant to this alien that which has been

[1] Preexamination was again denied because of the oversubcription of the Italian quota which is no longer oversubscribed today.

> denied to many, many other aliens in like circumstances where action has been taken under the *Lagomarsino* ruling of the Attorney General."

The Board thereupon again directed deportation.

This ruling was called to the attention of the District Court which again dismissed the writ of habeas corpus on November 4, 1950 and upon appeal to the Circuit Court of Appeals composed of Judges Augustus Hand, Chase and Clark, the dismissal of the writ was affirmed without opinion on February 15, 1951.

Reasons For Granting the Writ

As the opinions of the Board of Immigration Appeals indicate, hundreds of aliens were caught in the United States during the War. These aliens were unable to return to their native lands, first because, like petitioner, they then were recent arrivals of enemy nationality and were therefore detained in the United States by our government, and second, because they were unable to secure transportation. These individuals became acquainted during this period with the American way of life. They learned to speak English and established themselves here. When the shooting war was over, they naturally desired to remain here. Congress recognized the injustice of making these people return to their native land and enacted a statute granting the Attorney General authority to legalize the status of these individuals even though they had no American families, provided they were persons of good moral character and had a residence of 7 years. That petitioner is a person of good moral character and has 7 years residence is undisputed. In requesting the enactment of this statute, the Attorney General himself remarked that he was in a better position to judge the character of these

individuals who had been in the United States and subject to observation than newly-arrived immigrants.[2] However, prior to the enactment of this statute, the Attorney General in violation of his own regulations had issued a decision refusing to exercise discretionary relief for any alien who was caught here by reason of World War II. So drastic was this ruling that he even refused to exercise such discretion in the case of a man named *Lagomarsino* who had an American citizen wife dependent upon him for support. The problem presented by the instant case will affect the decisions in many hundreds of cases, as noted by the Board of Immigration Appeals. (See Appendix A). There have been frequent recent occasions in which the Attorney General has either refused to exercise discretion or has exercised discretion capriciously under our immigration laws. See: *Carlson* v. *Landon,* 186 F. 2(d) 183; *Mangaoang* v. *Boyd,* 186 F. 2(d) 191.

It is respectfully submitted that this is an issue involving an important question of federal law which has not been but should be settled by the Supreme Court—that is, whether or not the refusal to exercise discretion on the part of the Attorney General pursuant to a policy issued in violation of his own regulations offends due process and should be subject to review. Also at issue is whether such policy can continue to prevent the exercise of discretion after Congress has amended the law to authorize discretionary relief in the very cases where the Attorney General has refused such action.

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[2] House Immigration Hearings on H.R. 2933, 80th Congress.

ARGUMENT

Point I

The Attorney General's Policy Was Issued In Violation of 8 C.F.R. 90.12 And Is Therefore Invalid.

Section 90.12 as it existed on February 8, 1946, when the *Lagomarsino* decision was promulgated required that wherever the Attorney General reversed the Board of Immigration Appeals, he had to set forth his reasons in writing. As noted both by the majority and dissenting opinion in the instant case, 180 F. 2(d) 1003, 1010, the Attorney General gave no reason whatsoever. A decision by the Attorney General issued in violation of his own regulations is invalid. *Bridges* v. *Wixon,* 326 U.S. 135.

It is submitted that deportation on this record, founded as it is upon an invalid ruling of the Attorney General offends due process and should be set aside. See *Bridges* v. *Wixon, supra,* and *Sung* v. *McGrath,* 339 U.S. 33.

Point II

The Deportation Order Herein Was Invalid Because the Attorney General Refused to Exercise His Discretion.

It is clear that in each of the three opinions rendered by the Board of Immigration Appeals, acting for the Attorney General, the Board was motivated by the *Lagomarsino* case. In the two opinions annexed to the Court of Appeals decision and in the final decision which is annexed hereto as Appendix A, the Board of Immigration Appeals stressed the fact that it was bound by the *Lagomarsino* case. In its final opinion the Board of Immigration Appeals frankly acknowledged that this case was in the *Lagomarsino* category and that it would be unfair to others similarly situated

to grant favorable relief in the instant case. But this overlooks the fact that the *Lagomarsino* case was improperly decided and that it was decided prior to Public Law 863 (62 Stat. 1206) granting the Attorney General authority to legalize the status of those aliens who were in the United States 7 years. Congress made no discrimination against the aliens who were caught here and remained here by reason of World War II. On the contrary it required that an alien have 7 years residence and that he be here on July 1, 1948. This necessarily requires that the alien be in the United States during the war years.

In its opinion the Court of Appeals said:

> "(2) Courts have no power to review administrative discretion when it is reasonably exercised. United States ex rel. Weddeke v. Watkins, 2 Cir., 166 F. 2d 369, 373, certiorari denied, 333 U.S. 876, 68 S. Ct. 904, 92 L. Ed. 1152. But in appropriate circumstances, they can compel correction of an abuse of discretion or can compel an official to exercise his discretion where he has obviously failed or refused to do so. Such an obvious refusal occurs, we think, when an official sets up a class of cases as to which he refuses ever to exercise any discretion, one way or the other, if that class is not rationally differentiated from other cases, not within that class, where he uses his discretion case by case. Thus, where a trial judge refused to pass upon petitions for naturalization 'because of a policy . . . not to grant citizenship during the war' to a certain class of persons, it was held that the upper court could direct him to exercise his discretion. Schwab v. Coleman, 4 Cir., 145 F. 2d 672. This same doctrine has often been applied to officials who are not judges. See, e.g., the statement in Wilbur v. United States, 281 U.S. 206, 218, 50 S. Ct. 320, 74 L. Ed. 809.
>
> "(3) The Board here has held that the discretionary power delegated to it by the Attorney General cannot be exercised to allow Mastrapasqua either preexamination or suspension of deportation. The sole

> ground given has been that Mastrapasqua is a member of a class to which the Attorney General has decided that, as a matter of policy, such discretionary relief shall not be accorded. For here, the Board, in denying these two types of relief to Mastrapasqua, has twice held that it was bound by the decision of the Attorney General in Matter of Lagomarsino, No. A-5955999. . ."

Nevertheless when the case was remanded to the Board of Immigration Appeals, for a third consideration, it referred again to the *Lagomarsino* case and considered itself bound thereby. (Appendix A). It is true that it indicated that it was not only giving weight to the *Lagomarsino* case but also to the additional factors that the petitioner had no family ties in the United States and that he had remained here after being ordered to leave the United States. But Congress, in enacting the statute, specifically waived the requirement of family ties for those who had seven years residence. Nor should petitioner be penalized because of refusal to leave the United States where the order directing his voluntary departure without deportation was based upon the denial of permanent adjustment of his status pursuant to the invalid *Lagomarsino* policy of the Attorney General.

In this connection, the instant case falls within the ruling of the Supreme Court in *Bridges v. Wixon*, 326 U.S. 135, where the majority of the Court said:

> "In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (Tisi v. Tod, 264 U.S. 131, 144) or by showing that incompetent evidence was admitted and considered. Vajtauer v. Commissioner, supra, p. 106. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made."

It is wholly speculative whether the Board of Immigration Appeals would have refused to exercise discretionary relief herein were it to have been uninfluenced by the *Lagomarsino* case.

It is clear, then, that the *Lagomarsino* principle—a principle of arbitrary and invalid refusal to exercise discretion—pervaded each and every administrative consideration of this case. Capricious administrative action or inaction of this character is reviewable under the Administrative Procedure Act, 5 U.S.C. 1009(e). See also *Carlson v. Landon, supra; Mangaong* v. *Boyd, supra; Schwab* v. *Coleman,* 145 F. 2(d) 672.

There has therefore been no compliance with the mandate of the Circuit Court as expressed in 180 F. 2(d) 999.

It is submitted that this is not a case in which discretion has been exercised or properly exercised. On the contrary it is one where the exercise of discretion has been refused or capriciously exercised. Under these circumstances the deportation order entered herein should not be permitted to stand.

Conclusion

Deportation is a drastic measure and is often the equivalent of banishment or exile. Is it too much to expect that in such proceedings our administrative authorities exercise their discretion freely and untrammelled by policy considerations which Congress did not authorize them to utilize? This improper administration of the immigration laws becomes more apparent when it is realized that the policy consideration was adopted by the Attorney General *prior* to the enactment of the statute under which discretion is here sought. If this be called the exercise of discretion, if this type of practice on the part of the Attorney General be permitted without review by the Supreme Court, then

administrative caprice will be freely substituted without limitation for administrative discretion, and the Attorney General will be authorized to disregard his own regulations, which have the force and effect of law.

Respectfully submitted,

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CHARLES GRAFF,
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APPENDIX A

File: A-5587208.

In re: Francesco Mastropasqua in Deportation Proceedings.

In Behalf of Respondent: Charles Graff, Esquire, 154 Nassau Street, New York, New York. Heard: September 7, 1950.

Charges: Warrant: Act of 1924—Remained longer.

Lodged: None.

This case is now before the Board on an appeal from the decision of the Acting Assistant Commissioner denying this alien's application for preexamination or suspension of deportation. In argument before the Board, counsel for the alien asked for suspension of deportation. This case basically is simple and is similar to many hundreds of cases in the past considered by this Board. Through succession of motions and various proceedings a rather voluminous record has been created. The alien is an Italian, who arrived at the port of Boston, Massachusetts, on June 7, 1940 as a member of the crew of the Italian SS "Dino." Under the regulations then in effect, he had 60 days within which to leave. He did not leave within the 60-day period and thereby became subject to deportation.

On May 31, 1941 for security reasons the alien was removed from the SS "Dino" and was interned until June 17, 1943. He was then paroled and was at large until taken into custody for deportation. Although an order of deportation was entered on May 23, 1941, it was later withdrawn and the alien was given the privilege of voluntary departure without preexamination. The denial of preexamination was based on the ruling of the Attorney General in the *Matter of Lagomarsino,* A-5955999 (February 8, 1936). The Commissioner's order points out the various periods granting the alien time within which to depart voluntarily and his failure to abide by the provisions of these orders. After Section 19(c) of the Immigration Act

of 1917 was amended by the Act of July 1, 1948, making seven years' residence in the United States a basis for suspension of deportation in the discretion of the Attorney General, an application was made for suspension of deportation and was denied on the basis of the *Lagomarsino* ruling.

Failing to leave the country the order of deportation was reinstated. Habeas corpus proceedings were later instituted. The District Court dismissed the writ. On appeal the Circuit Court of Appeals for the Second Circuit remanded the case "with directions to the district court to order appellant released from custody unless, within a reasonable time to be determined by the district court, the Immigration and Naturalization Service exercises discretion, one way or another, with respect to Mastrapasqua upon his application for pre-examination or suspension of deportation." This ruling of the court was based on the holding that the Attorney General's policy laid down in the *Lagomarsino* case was an improper use of discretion. The *Lagomarsino* case held in effect that preexamination or suspension to legalize residence in the United States would be denied aliens whose presence in the United States was the result of circumstances arising out of the late war. The ruling was, however, later modified to permit of suspension of deportation or preexamination where the alien had a citizen or legally resident alien wife or minor children. In commenting on this classification the court stated:

> "No justification of this classification is in the record of either the present case or in Matter of Lagomarsino. Nor can we discern any. There seems no more rationality in this classification than there would be in arbitrarily refusing to consider discretionary relief for all left-handed men or for all whose names begin with the first thirteen letters of the alphabet. Accordingly, we conclude that the classification is capricious."

In the *Matter of Westerhausen*, file A-5908014, decided May 31, 1950 (copy of decision attached for ready reference), we discussed the reasoning which prompted the adoption of the Lagomarsino rule.

As a basic premise in considering discretionary action, we hold we are obligated morally, if not legally, to treat

alike all aliens in like circumstances. This obviously requires the formation of certain standards or categories as a guide to the grant of discretion. We do not understand that the ruling of the Second Circuit is to the contrary. We believe the holding to be that, as the court viewed it, the *Lagomarsino* ruling was unsupported by reason and therefore capricious. In the *Westerhausen* case, we have given the reasons which prompted the *Lagomarsino* policy and of which apparently the court was unaware. We hold it would be arbitrary and capricious on our part to grant to this alien that which has been denied to many, many other aliens in like circumstances where action has been taken under the *Lagomarsino* ruling of the Attorney General.

In addition to this reason, the alien has his wife and four children in Italy. The immigration laws favor uniting families—not separating them; and, therefore, we do not believe this case has appropriate appeal for suspension of deportation.

We also hold that as this alien acquired seven years' residence in the United States by failure to leave the United States voluntarily after requesting such privilege and through counsel's giving assurances he would so leave (See Board order of November 15, 1945), he should not be granted suspension of deportation. It is our holding that residence acquired under such circumstances ought not to be applauded by the grant of suspension of deportation.

Counsel admits that preexamination is not in order as a quota number is not readily available. His argument to us was limited solely to the proposition that the alien ought to be granted suspension of deportation.

For the above reasons, we affirm the order of the Commissioner.

Order: It is ordered that the appeal be dismissed.

——— ———,

Chairman.

TCF/jr.

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